

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
GERARD F. BINDER :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1983 :  
through February 28, 1986. :

DETERMINATION  
DTA NOS. 805624  
AND 809527

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GERARD F. BINDER :  
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Petitioner, Gerard F. Binder, 75 Main Street, Roslyn, New York 11576, filed a petition for revision of a determination or for refund of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through February 28, 1986.

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 21, 1990, with briefs to be submitted by December 10, 1990. Thereafter, petitioner filed a separate petition for revision of a determination or for refund of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1987. At petitioner's request, the petitions were joined, and the initial proceeding was continued. A consolidated hearing was held and completed on December 5, 1991. The Division of Taxation submitted a brief on April 24, 1992. Petitioner submitted a brief on June 1, 1992. Petitioner appeared at hearing pro se, and appeared on the brief by Michael Weitzner, Esq., and Elizabeth Binder, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della

Porta, Esq., of counsel).

### ISSUES

I. Whether petitioner was a person responsible for the collection and remittance of sales and use taxes on behalf of Musikahn Corporation and Jack Kahn Music Co., Inc., pursuant to sections 1131(1) and 1133(a) of the Tax Law so as to render him personally liable for such taxes.

II. Whether, if petitioner was personally liable for taxes due from Musikahn Corporation, he established that failure to pay such taxes was due to reasonable cause and not to willful neglect.

### FINDINGS OF FACT

On October 27, 1986, the Division of Taxation ("Division") issued to petitioner, Gerard F. Binder, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (number S861025470C) for the period December 1, 1984 through May 31, 1985, assessing sales and use taxes due as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
February 28, 1984	\$15,645.23	\$ 3,911.38	\$ 5,741.39
February 28, 1985	77,582.58	18,619.81	16,480.41
May 31, 1985	17,555.66	3,686.68	3,095.20

The notice states that petitioner is liable for these taxes under sections 1131(1) and 1133 of the Tax Law as an officer of Jack Kahn Music Co., Inc. ("Jack Kahn").

The Division issued a second notice (S86102971C) to petitioner which was also a subject of these proceedings; however, at the outset of the hearing, the Division conceded that all taxes assessed by that notice had been paid and that the notice should be cancelled.

The tax assessments for the periods remaining in issue were based upon sales tax returns filed by the corporation without remittance of the tax shown as due. Pursuant to a conciliation order dated March 25, 1988, the amount of the tax assessment was reduced to \$95,138.24. This resulted from cancellation of the tax assessed for the quarter ended February 28, 1984 in the amount of \$15,645.23.

Jack Kahn filed a quarterly sales tax return for the quarter ending February 28, 1985,

showing a total tax liability for the quarter of \$133,067.76 and prior monthly payments of \$101,702.41, resulting in a balance due of \$31,365.35. The Division's computerized accounts receivable records show total payments for the quarter of \$55,485.18, leaving a balance due of \$77,582.58. The Division's records also show that a notice and demand was issued to Jack Kahn on November 13, 1985, based upon the filed return.

Jack Kahn also filed a sales tax return for the quarter ending May 31, 1985, showing total tax due of \$17,555.66. No tax was remitted with the filing of the return.

Prior to 1980, petitioner was a 50 percent shareholder of Jack Kahn which owned and operated a string of retail stores selling pianos and organs in the metropolitan New York area. In 1980, a second corporation, Musikahn Corporation ("Musikahn"), was formed in order to facilitate the combination of Jack Kahn and Keyboard Enterprises, a company in which petitioner had an investment interest. Musikahn, essentially a holding company, held a 50 percent interest in Jack Kahn. Petitioner was the chief executive officer of Musikahn and owned 80 percent of its stock. Arthur Wachs, who operated Keyboard before its combination with Jack Kahn, became the senior executive vice president and chief operating officer of MusiKahn and held 20 percent of its stock. Prior to March 1985, Musikahn acquired 100 percent of the stock of Jack Kahn.

Petitioner and Mr. Wachs divided responsibility for the operation and management of Musikahn between themselves. From 1980 through April 1985, Mr. Wachs was primarily responsible for administration and bookkeeping. Mr. Wachs had the authority to and did sign checks on behalf of Musikahn and maintained the corporate books and records. To assist him in carrying out his duties, he replaced some of Jack Kahn's employees with former Keyboard employees, including a Mr. Elkadi who was comptroller of Musikahn. Petitioner was primarily responsible for sales, marketing, and advertising.

Shortly after the formation of Musikahn, petitioner discovered that the company was in poor financial shape, a circumstance he attributed primarily to the financial condition of Keyboard. In addition, the company suffered from the nationwide recession of 1982. Musikahn

struggled financially through the end of 1983 as petitioner undertook steps to keep it in business. Several stores were closed, debts were satisfied and the company was restructured, so that, by the end of 1983, Musikahn showed a small profit. However, the capital of Jack Kahn was almost exhausted in the process. At about this point in time, petitioner was approached by a broker who suggested that Musikahn "go public". Petitioner anticipated that the sale of Musikahn stock on the public exchange would supply a needed infusion of capital, and he agreed to the proposal.

From about September of 1984 through March 1985, petitioner was primarily involved in overseeing Musikahn's public offering of stock. This involved working with financial and legal professionals to prepare a prospectus for filing with the Federal Securities and Exchange Commission ("SEC") and seeking potential investors. At the same time, Musikahn continued to suffer from financial setbacks. As of June 1984, Musikahn had a negative net worth and negative working capital. Between the commencement of the public offering and the closing in March 1985, sales continued to decline. Shortly after the public offering was completed, the credit corporation that financed Musikahn's inventory of pianos and organs collected all monies owed it and advised Musikahn that it would no longer extend credit. At that point, Musikahn was faced with substantial debts and little or no cash flow.

As of April 17, 1985, Arthur Wachs resigned as an officer and director of Musikahn and ceased his employment with that company. Petitioner continued as chief executive officer of Musikahn and became primarily responsible for its administration and operation. He was convinced that the company could be made financially solvent and continued to work toward this goal.

Petitioner caused Musikahn to file a petition for reorganization under chapter 11 of the Bankruptcy Code on October 22, 1985. Musikahn continued to operate as a debtor-in-possession pursuant to an order of the United States Bankruptcy Court of the Eastern District of New York issued on October 29, 1985. The order authorized Musikahn to enter into a financing agreement with General Electric Credit Corporation ("GECC"). By the terms of that

agreement, Musikahn was to turn over to GECC all proceeds of the sale of its merchandise and any outstanding receivables. In turn, GECC was authorized to retain a portion of the proceeds in satisfaction of Musikahn's pre-bankruptcy and post-bankruptcy debts to GECC. The remainder of the proceeds were to be applied directly by GECC to Musikahn's operating expenses. As pertinent to these proceedings, the order of the Bankruptcy Court states:

"Lender is hereby permitted to deliver to Debtor in Possession the following amounts of Cash Collateral from proceeds of Pre Petition Collateral and Post Petition Collateral which have been deposited into the Depository Account and have cleared:

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"(ii) The payment made by each buyer for sales taxes or other applicable taxes on an item of either Pre Petition or Post Petition Collateral."

Musikahn continued to maintain its own records of sales and of sales tax collected and accrued; however, since all monies collected were deposited in a GECC account, Musikahn was required to request that GECC issue checks to New York State to be applied to sales taxes due. In practice, this sometimes resulted in delay of payment and inadequate recordkeeping. There is no evidence in the record that GECC failed to issue checks when instructed to do so by petitioner, although it did not necessarily do so on a timely basis.

Despite petitioner's efforts, Musikahn never recovered financially. On June 21, 1989, an order for relief converting the chapter 11 case to a liquidation case under chapter 7 was entered by the Bankruptcy Court. On June 27, 1989, an interim trustee was appointed, and he continued as the permanent trustee. The debtor's property was completely liquidated during the course of numerous attempt to fund the proposed plan of reorganization. In an attempt to save Musikahn, petitioner put all of his personal assets into the company. This included mortgaging his home to pay off corporate debts and to keep Musikahn operating.

Prior to the filing of the voluntary petition in bankruptcy, the SEC, undertook an investigation of petitioner for possible stock fraud and stock manipulation in connection with the public offering of Musikahn's stock. As a result of the investigation, petitioner pleaded guilty in 1990 to two counts of securities fraud. The acts which formed the basis for the charges

included a failure to amend the prospectus filed with the SEC prior to closing to reflect the true financial condition of Musikahn and a false statement in the prospectus indicating that a payment for consulting services was a purchase of computer software with an asset value of \$50,000.00.

In May 1985, the SEC subpoenaed all of Musikahn's books and records. Those records remained in the possession of the SEC; however, petitioner had access to those records from at least January 7, 1991 to the conclusion of these administrative hearings.

In May 1987, the Division began an audit of Jack Kahn for the period September 1, 1984 through November 19, 1986. As a result of that audit, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 11, 1988, assessing tax, penalty and interest as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
November 30, 1984	\$ 137.50	\$ 34.38	\$ 73.24
August 31, 1985	52,942.89	15,882.87	21,210.62
November 30, 1985	20,359.28	6,107.78	7,316.24
February 28, 1986	96.53	28.96	30.86
November 19, 1986	1,293.39	362.15	266.01

A second Notice of Determination and Demand for Payment of Sales and Use Taxes Due, also dated July 11, 1988, was issued to petitioner for the period November 20, 1986 through August 31, 1987, assessing sales and use tax due for that period of \$18,435.71 plus penalty and interest as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
November 30, 1986	\$ 748.79	\$ 209.66	\$ 154.00
February 28, 1987	320.04	80.01	54.57
May 31, 1987	9,758.62	2,146.90	1,323.80
August 31, 1987	7,608.26	1,445.57	774.71

The two notices were issued separately because the auditor mistakenly believed that the petition in bankruptcy was filed on or around November 20, 1986. The two notices were apparently intended to cover the pre-petition and post-petition periods.

Pursuant to a conciliation order dated February 8, 1991, the amount of tax assessed for the period September 1, 1984 through November 19, 1986 was reduced to \$21,886.76 plus

penalty and interest. By the same order, the Division sustained the notice issued for the period November 20, 1986 through August 31, 1987.

As part of her audit, the auditor compared filed sales tax returns with Jack Kahn's sales tax accrual account. Based upon the difference between the amount of tax collected, as shown in the tax accrual account, and the amount of tax paid by Jack Kahn, the Division assessed sales tax as follows: \$20,359.28 for the period ending November 30, 1985; \$9,545.86 for the period ending May 31, 1987; and \$7,540.26 for the period ending August 31, 1987. An analysis of the corporation's purchase of fixed assets resulted in a determination of tax due in the amounts of \$137.50 for the period ending November 30, 1984; \$2,042.18 for the period ending November 30, 1986; \$320.04 for the period ending February 28, 1987; \$212.76 for the period ending May 31, 1987; and \$68.00 for the period ending August 31, 1987. In addition, tax was assessed for the period ending August 31, 1985, in the amount of \$52,942.89, based upon a transfer of fixed assets. This portion of the assessment was cancelled by the conciliation order. Tax assessed for the period ended February 28, 1986, in the amount of \$96.53, was based upon a single sale of \$1,170.00 which Jack Kahn claimed to be exempt but for which it produced no exemption certificate.

The record contains a number of documents which evidence petitioner's authority to act on behalf of Musikahn and of Jack Kahn. These documents are briefly described below.

(a) On December 24, 1984, petitioner issued a memorandum to Mr. Wachs, Mr. Elkadi and another employee of Musikahn stating that they were not to release any previously issued checks or to draw new checks for Musikahn without petitioner's permission. The memorandum states:

"This instruction is necessary at this moment so that our cash flow can be managed according to the plans that I have made through this year-end period and into January."

According to petitioner, the policy stated was never effectuated because limitations on his time made it impractical for him to review all checks. He also stated that the policy was rescinded almost immediately after it was issued.

(b) Petitioner signed a "Consent to Fixing of Tax Not Previously Determined and Assessed", dated March 12, 1985, agreeing on behalf of Jack Kahn to pay taxes in the amount of \$47,992.25 for the period June 1, 1981 through August 31, 1984.

(c) Throughout the periods in issue, petitioner, acting on behalf of Jack Kahn, executed consents to extend the period of limitation for assessment of sales and use taxes. Consents signed by petitioner were dated: April 19, 1984, November 13, 1987, and March 4, 1988.

(d) Petitioner had the authority to and did sign checks on behalf of Jack Kahn, including a check dated July 20, 1984 and checks dated March 20, 1987, June 20, 1987 and October 2, 1987.

During the assessment periods petitioner had the authority to and did hire and fire employees on behalf of Musikahn. He had total access to the books and records of Musikahn.

During the period December 1, 1984 through February 28, 1985, Arthur Wachs also had authority to and did sign checks on behalf of Musikahn. Mr. Wachs signed checks in payment of sales tax due for the month of January 1985 and for the period ending February 28, 1985.

At the first hearing, held on June 21, 1990, petitioner conceded that he was a person required to collect tax on behalf of Musikahn. On the second day of hearing, he withdrew this concession and asserted that, as a matter of law, he was not such a person during the periods covered by the assessments.

In the period leading up to the public offering (roughly, early 1984 through March 1985), petitioner was totally involved in duties and responsibilities connected with the public offering. He had little time for the day-to-day management of Musikahn and left the administrative and bookkeeping duties to Mr. Wachs. Petitioner maintains that he and Mr. Wachs had separate areas of responsibility and that petitioner had no actual control over the financial and bookkeeping activities of Musikahn. He claims that, until his resignation, Mr. Wachs had sole discretion to determine which of Musikahn's creditors were paid and which were not. Petitioner suggested that Mr. Wachs exercised this discretion in a manner that was personally beneficial to Mr. Wachs and detrimental to Musikahn and petitioner. Petitioner testified that he was not even



aware that Musikahn failed to pay sales taxes due for the periods preceding the filing of the bankruptcy petition until receiving a notice of tax due.

Petitioner testified that he was told by Mr. Wachs and by Donald Talbot, a certified public accountant who prepared financial statements for the public offering, that Musikahn had no outstanding tax liabilities at the time of the public offering. He stated that had he known at that time that there were taxes due for the period December 1, 1984 through February 28, 1985 he would have seen to it that they were paid before the closing of the public offering.

During the hearing, petitioner claimed that at least a portion of the assessed tax was paid. He introduced in evidence a copy of Musikahn's December 1984 sales tax return showing tax due of \$77,582.58, a check register showing a check issued to New York Sales Tax on January 21, 1985 in the amount of \$77,582.58, and an accountant's worksheet showing the calculation of the December sales tax. In his post-hearing brief, he did not pursue that argument, and there is no evidence in the record that the Division received the December payment.

#### CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides, in pertinent part, that every person who is required to collect the tax imposed by article 28 of the Tax Law is personally liable for that tax. A "person required to collect such tax" is defined as:

"any officer, director, or employee of a corporation...who as such officer...is under a duty to act for such corporation in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

The opinion of the Tax Appeals Tribunal in Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) offers a useful summary of the factors which are to be considered in determining whether a corporate officer is under a duty to act for a corporation in complying with the requirements of article 28. These factors include:

"[T]he authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536); the individual's possible shared status as an officer, director or stockholder (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and

management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits [are] extremely important considerations' (Vogel v. New York State Dept. of Taxation & Fin., *supra*, at 226, 413 NYS2d 862, 865)" (Matter of Autex Corp., *supra*).

Petitioner concedes that when these factors are applied to the facts of his situation the conclusion reached is that he was a person under a duty to collect and remit sales tax on behalf of Musikahn. However, he claims that during the assessment periods other parties had the actual responsibility for compliance with the Tax Law. For the periods prior to the filing of the bankruptcy petition, petitioner identifies Arthur Wachs as the individual responsible for maintaining Musikahn's records of sales, preparing sales tax returns and determining which creditors were or were not paid. For periods following the filing of the petition in bankruptcy, petitioner claims that GECC was in actual control of the cash flow of Musikahn, leading him to believe that GECC was responsible for payment of sales taxes. For the following reasons, I find that petitioner was responsible for sales and use taxes due from Musikahn during all periods in issue.

B. More than one person may be under a duty to act for a corporation in complying with the Tax Law (Matter of Blodnick v. State Tax Commn., *supra*; Matter of Ernest Young, Tax Appeals Tribunal, September 19, 1991). Mr. Wachs may have been such a person. I draw no conclusions here on this question, but Mr. Wachs's responsibilities are not determinative of the primary inquiry here, whether petitioner was a person liable for sales taxes due from Musikahn. I can find no evidence that petitioner was ever precluded from exercising his authority as the chief operating officer, president and majority stockholder of Musikahn. Petitioner had control of the corporation's finances, had authority to determine which creditors would be paid and which would not, and had complete access to Musikahn's books and records. Petitioner's December 1984 memorandum to Mr. Wachs and others is evidence of his authority over the finances of the corporation. It is immaterial that he later rescinded the policy stated in the

memorandum. The fact that he had authority to order that no corporate checks be issued without his permission and that he expected such an order to be obeyed establishes that he had control over the finances of Musikahn and was capable of exercising that control if need be.

Petitioner contends that he reasonably relied on assurances made by Mr. Wachs and an outside accountant that Musikahn had no outstanding tax liabilities at the time of the closing of the public offering, and he argues that he should not be held liable for the taxes reported due for periods prior to the filing of the bankruptcy petition of December 1984 because he was not aware that these taxes remained unpaid until he received a notice of determination. He stresses that in relying on the information provided by Mr. Wachs and others he acted with ordinary business care and prudence. There is no evidence in the record directly contradicting petitioner's testimony; however, even if petitioner was advised that Musikahn had no outstanding tax liabilities, this in itself does not relieve petitioner of personal liability for the sales tax due. The crucial question is whether petitioner had sufficient authority to ensure that the sales taxes of Musikahn were paid (see, Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991). When, as here, that question is answered affirmatively, no surrounding circumstances have been found sufficient to relieve an officer of personal liability for sales taxes. In Matter of Cohen v. State Tax Commn (supra) the court found that an officer not responsible for the daily management of a corporation was still liable for that corporation's sales tax where he played a role in the corporation's overall management (id., 513 NYS2d at 566). In Matter of Martin (Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239), misplaced trust in an individual who willfully sought to mislead was found insufficient to relieve an officer with legal authority to act for the corporation of his personal liability for sales taxes due. Exceptions to the general rule of liability of corporate officers have been made where an officer and minority stockholder "was precluded" from acting on behalf of the corporation by a majority stockholder (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990); where the corporate structure placed the officer outside the direct line of control of the finances of the corporation (Matter of Roncolato, supra); and where a creditor

seized a corporation's assets and deprived the officer of access to the corporation's books and records (Matter of Stern, Tax Appeals Tribunal, September 1, 1988). Nothing in this record indicates that petitioner lacked the authority or the actual ability to act on behalf of Musikahn during the period prior to the filing of the bankruptcy petition; consequently, he is liable under sections 1131(1) and 1133(a) of the Tax Law for the taxes due from Musikahn for period December 1, 1983 through February 28, 1986.

Petitioner is also personally liable for taxes due from Musikahn after the filing of the bankruptcy petition. Musikahn was the debtor-in- possession after the petition was filed. Petitioner remained as corporate officer, and he remained responsible for Musikahn's compliance with the Tax Law. In fact, from this period on he was solely responsible for the financial affairs of Musikahn. The sales tax assessment arises from three sources: the difference between the amount of tax collected (as shown in Musikahn's records) and the amount of tax paid; sales tax due on Musikahn's purchases of fixed assets; and a single sale of \$1,170.00 which Musikahn could not prove to be exempt from tax. The vast majority of the tax arises from Musikahn's failure to pay over to the State the full amounts shown in its sales tax accrual account. Petitioner provided no explanation for this failure. The evidence shows that petitioner had full authority to direct payment from GECC to the State for sales taxes due from Musikahn, and there is no evidence that GECC did not make payments when instructed to do so by petitioner. Since he had authority to direct payment of sales taxes, he is personally liable for the sales taxes assessed.

C. Tax Law § 1145(a)(1)(i), (ii) provides for the imposition of penalty and statutory interest upon persons who fail to timely file a return or timely pay any tax under articles 28 and 29 of the Tax Law. Under Tax Law § 1145(a)(1)(iii), such penalty and interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect...." By requiring the imposition of penalties (rather than allowing for it at the Commissioner's discretion), the Tax Law places a substantial burden on the taxpayer to establish reasonable cause (see, Matter of MCI Telecommunications Corp., Tax Appeals Tribunal, January 16,

1992). The existence of reasonable cause as well as the absence of willful neglect must be determined on a case by case basis in light of all the circumstances specific to the taxpayer in question (see, Matter of Norwest Bank International, Tax Appeals Tribunal, May 3, 1990).

Petitioner seeks abatement of penalty on the grounds that he acted with good intentions throughout the assessment periods and exercised ordinary business prudence in carrying out his responsibilities to collect and remit sales taxes to the State. He asserts that he had no reason to doubt assurances made to him at the time of the public offering that Musikahn had no outstanding tax liabilities. He also claims that he reasonably believed that he was not responsible for payment of sales taxes after the filing of the bankruptcy petition, based upon the arrangement with GECC.

Good faith is not sufficient to establish reasonable cause (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557), and the other circumstances identified by petitioner do not show reasonable cause. Essentially, petitioner claims that he either did not know taxes were not paid (taxes due for the period before the filing of the bankruptcy petition) or did not have control over tax payments (tax due for periods after the filing of the petition). Inasmuch as it has been found that petitioner exercised control over the financial affairs of Musikahn throughout the periods of assessment, his claims of lack of knowledge and control must be rejected as a basis for finding reasonable cause.

Petitioner argues that he was prejudiced by his inability to obtain access to books and records subpoenaed by the SEC in May 1985. The evidence establishes that those records were available to petitioner prior to the second hearing date. Petitioner had every opportunity to use those records to support his position. Any prejudice to petitioner flowing from the subpoena of those records or the transfer of records to the trustee in bankruptcy is insufficient to establish reasonable cause.

D. Based upon the statements of the Division made at hearing, the notice of determination issued for the period June 1, 1985 through February 28, 1986 (notice number S861025471C) is cancelled. Notice of determination number S861025470C, as modified by the

conciliation order (Finding of Fact "3"), is sustained. Notice of determination number S880701001N, as modified by the conciliation order (Finding of Fact "16"), is sustained. Notice of determination number S880701003N is sustained.

E. The petitions of Gerard J. Binder are granted to the extent indicated in Conclusion of Law "D", and in all other respects, the petitions are denied.

DATED: Troy, New York  
August 27, 1992

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE